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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/731,360	12/09/2003	Walt Schierioth	BB-31778(1)	4397
22202	7590	05/31/2006	EXAMINER	
WHYTE HIRSCHBOECK DUDEK S C			STULII, VERA	
555 EAST WELLS STREET			ART UNIT	
SUITE 1900			PAPER NUMBER	
MILWAUKEE, WI 53202			1761	

DATE MAILED: 05/31/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/731,360	SCHIERIOTH, WALT	
	Examiner	Art Unit	
	Vera Stulii	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>04/21/04</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 102

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 and 10-12 rejected under 35 U.S.C. 102(b) as being anticipated by Narayanaswamy et al (6,165,524).

In regard to claim 1, Narayanaswamy et al. disclose shelf stable batter comprising wheat flour (col. 4 lines 27-30), sugar syrup (col. 4 line 58), shortening (col. 5 lines 10-15), and an encapsulated leavening system (col. 10 lines 6-13). Since Narayanaswamy et al. teach the use of sugar syrup in batter composition, sugar syrup inherently function as a sole moisturizing agent.

In regard to pH limitations recited in claims 1-4, Narayanaswamy et al. teach a pH from about 6.0 to 8.5 (including about 5.25 to 5.7).

In regard to water activity limitations recited in claims 1, 5, and 6, Narayanaswamy et al. teach water activity less than 0.85 (including about 0.72 to 0.75).

In regard to claim 7, Narayanaswamy et al. teach that "The particular selection of ingredients and concentration are selected to provide batters having a water activity of less than 0.85 and for best results less than 0.85 to about 0.55. Selection of such water activity value is important to achieving a balance between microbial shelf stability and batter handling characteristics." (col. 7 lines 54-58).

In regard to claim 8, Narayanaswamy et al. disclose shelf stable batter comprising corn syrup (col. 4 line 61).

In regard to claim 10, Narayanaswamy et al. disclose shelf stable batter comprising wheat starch (col. 8 lines 65-68) and non-fat dried milk (col. 9 lines 23-25).

In regard to claim 11, Narayanaswamy et al. disclose shelf stable batter comprising gum (col. 8 lines 51-59).

In regard to claim 12, Narayanaswamy et al. disclose shelf stable batter essentially comprising sugar from about 1% to 70% of the total batter (col. 4 lines 48-49).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Narayanaswamy et al (6,165,524) in view of Hahn (6,217,929). Claim 9 recites that the corn syrup is high fructose corn syrup. Narayanaswamy et al. fail to disclose the corn syrup being high fructose corn syrup. Hahn teaches the use of high fructose corn syrup

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in spoonable batter compositions for the purpose of reducing "the amount of free water in the composition and thereby lower the Aw of the composition" (col. 3 lines 17-19 and 24-25). It would have been obvious to one skilled in the art at the time the invention was made to use the high fructose corn syrup of Hahn in Narayanaswamy in order to reduce the water activity of the batter composition.

References cited on the PTO 892 form are cited as pertinent art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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VS

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